



# PROMOTING LEGAL FRAMEWORKS FOR DEMOCRATIC ELECTIONS



An NDI Guide for Developing Election Laws  
and Law Commentaries

*Patrick Merloe*

# Promoting Legal Frameworks for Democratic Elections

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and Law Commentaries

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NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS (NDI)

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## ABOUT NDI

The National Democratic Institute for International Affairs (NDI) is a nonprofit organization working to strengthen and expand democracy worldwide. Calling on a global network of volunteer experts, NDI provides practical assistance to civic and political leaders advancing democratic values, practices and institutions. NDI works with democrats in every region of the world to build political and civic organizations, safeguard elections, and promote citizen participation, openness and accountability in government.

Democracy depends on legislatures that represent citizens and oversee the executive, independent judiciaries that safeguard the rule of law, political parties that are open and accountable, and elections in which voters freely choose their representatives in government. Acting as a catalyst for democratic development, NDI bolsters the institutions and processes that allow democracy to flourish.

**Build Political and Civic Organizations:** NDI helps build the stable, broad-based and well-organized institutions that form the foundation of a strong civic culture. Democracy depends on these mediating institutions—the voice of an informed citizenry, which link citizens to their government and to one another by providing avenues for participation in public policy.

**Safeguard Elections:** NDI promotes open and democratic elections. Political parties and governments have asked NDI to study electoral codes and to recommend improvements. The Institute also provides technical assistance for political parties and civic groups to conduct voter education campaigns and to organize election monitoring programs. NDI plays a leading role in international election observation and was an initiator and co-drafter of the Declaration of Principles for International Election Observation. The Institute has organized international delegations to monitor elections in dozens of countries, helping to ensure that polling results reflect the will of the people.

**Promote Openness and Accountability:** NDI responds to requests from leaders of government, parliament, political parties and civic groups seeking advice on matters from legislative procedures to constituent service to the balance of civil-military relations in a democracy. NDI works to build legislatures and local governments that are professional, accountable, open and responsive to their citizens.

International cooperation is key to promoting democracy effectively and efficiently. It also conveys a deeper message to new and emerging democracies that while autocracies are inherently isolated and fearful of the outside world, democracies can count on international allies and an active support system. Headquartered in Washington D.C., with field offices in every region of the world, NDI complements the skills of its staff by enlisting volunteer experts from around the world, many of whom are veterans of democratic struggles in their own countries and share valuable perspectives on democratic development.

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## ACKNOWLEDGEMENTS

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This Guide was prepared by the National Democratic Institute (NDI) to assist political parties, civic organizations, legal activists and others concerned with developing legal frameworks for democratic elections. The Guide reflects nearly 25 years of NDI experience in more than 90 countries around the globe in their efforts to ensure electoral integrity, popular participation and democratic governance.

The Institute has been called upon to provide commentaries on the development of electoral frameworks, including examples as diverse as: the 1989 Roundtable negotiations that led to the transfer of power in Czechoslovakia; the 1991 negotiations concerning Senegal's electoral code; the CODESA negotiations that brought about multi-racial elections in South Africa; the framework for elections following the 1994 return to civilian government in Haiti; the 1995 proposed Palestinian Council election law; and the 1998 frameworks proposed for elections in Indonesia and Bosnia and Herzegovina. NDI also has offered recommendations on legal frameworks as part of over 150 international election observer delegations that examined election-day, pre-election and post-election developments. NDI election law commentaries and election observation statements are available at <http://www.ndi.org/globalp/elections/elections.asp>.

The Institute recognizes that questions concerning passage of laws and their implementation are matters that relate to national sovereignty. NDI, therefore, places emphasis on working in support of local civic and political activists, legal experts, legislators and electoral and other governmental officials as they develop legal frameworks for elections. The Institute has supported election law development efforts of local actors in its programs and has provided assistance to political parties and civic organizations concerning election law development in more than 40 countries.

NDI also cooperates with the efforts of other international organizations in promoting electoral integrity. The Institute, along with the United Nations Electoral Assistance Division (UNEAD) and The Carter Center (TCC), was a convener of the process that led to the *Declaration of Principles for International Election Observation*, now endorsed by 32 international organizations, which continue to interact concerning issues relating to assessing the character of elections. NDI also collaborates on the development of international principles for democratic elections with the UNEAD, the Organization of American States (OAS), the Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights (OSCE/ODIHR), the European Commission (EC), the Council of Europe's Venice Commission, Southern Africa Development Community Parliamentary Forum (SADC-PF), International IDEA, and other intergovernmental organizations, non-governmental groups and regional associations of domestic election monitors and parliamentarians.

The Institute admires the efforts of political and civic activists, electoral officials, legislators and legal experts who are seeking to advance legal frameworks for democratic elections. This is a complicated task that requires an open and inclusive political process, for its outcome directly affects the compact between the citizens of a country, in whom sovereignty resides, and those who seek the authority to exercise the powers of government.

While there are many permutations and combinations of the various elements that make up electoral frameworks, building broad dialogue and political consensus among citizens and electoral contestants concerning the rules for competing for power are critical to developing confidence in election processes and governments that result from elections.

NDI recognizes those who have promoted democratic electoral frameworks in their countries and have sought outside advice on this subject. The Institute expresses its deep gratitude to the many experts – politicians, legislative drafters, legal scholars and political rights activists from many countries – who have contributed their time to improve NDI's contributions to analysis, commentaries and recommendations concerning legal frameworks for democratic elections. They are too numerous to name, though their contributions have been and remain invaluable.

This Guide was written by Patrick Merloe, NDI Senior Associate and Director of Electoral Programs. Sections of the Guide were reviewed by: Hrair Balian, USA (The Carter Center, formerly with OSCE/ODIHR); Sandra Coliver, USA (Open Society Justice Initiative); Andrew Ellis, UK (International IDEA); Matthew Frumin, USA (NDI Senior Advisor, formerly with the law firm of Steptoe & Johnson); Rafael Lopez-Pintor, Spain (IFES, formerly with the Universidad Autónoma de Madrid); Gerald Mitchell, UK (OSCE/ODIHR); David A. Marcello, USA (International Legislative Drafting Institute); Armando Martinez-Valdes, Panama (UN Electoral Assistance Division); Lawrence M. Nobel, USA (law firm of Skadden Arps, formerly General Council to the US Federal Election Commission); Simon Osborn, UK (Electoral Reform International Services); Jessie V. Pilgrim, USA (comparative election law expert); Donald J. Simon, USA (the law firm of Sonosky, Chambers, Sachse, Endreson & Perry, formerly General Counsel to Common Cause); and Felix Ulloa, El Salvador (NDI Resident Director in Morocco). NDI is grateful to each of these experts for providing their comments; the Institute, however, is responsible for any errors or shortcomings that may be presented in the Guide. Joseph A. Scrofano, former NDI legal intern, provided invaluable research assistance in the development of Sections Two and Appendix Four of the Guide. Tara R. Gingerich, formerly with the law firm of Steptoe & Johnson, and Ann Colville Murphy, former NDI Elections Legal Advisor, provided important contributions to Section Four and research assistance for Appendix Four of the Guide. Working on the production of the Guide were: Richard Klein, NDI Senior Advisor, Linda Patterson, former NDI Program Officer; Julia Brothers, NDI Program Officer; Laura Grace, NDI Senior Program Assistant; and Elizabeth Owerbach and Sarah Saperstein, NDI interns. Layout of the Guide was produced by Marc Rechdane, Resident Graphic Designer, in NDI's Beirut office.

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NDI hopes that this Guide will make a contribution to those seeking to develop frameworks for democratic elections. The Institute recognizes that sound electoral frameworks are a necessary but insufficient precondition for democratic elections. Ultimately, political will is essential to ensuring that laws are implemented properly and in ways that promote citizen confidence in elections and their outcomes. Readers of the Guide are encouraged to contact NDI with any comments, suggestions or requests.

**Kenneth Wollack**  
President, NDI



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## HOW TO USE THIS GUIDE

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This Guide is designed to assist political parties, candidate support groups, civil society organizations and legal activists in assessing electoral related laws and developing commentaries, recommendations and advocacy for advancing legal frameworks for democratic elections. It also can be used by journalists and others seeking to understand issues concerning electoral laws and their implementation.

While the Guide is designed for use by domestic constituencies interested in promoting electoral integrity, it can also be used by the international community in assessing electoral laws and promoting democratic elections, including, for example, international election observation missions, rule of law and legislative strengthening initiatives and the donor community.

The Guide provides a variety of tools arranged by sections. Not all of the sections need to be used at the same time, nor do they necessarily serve the same purposes.

Section One notes rationales for why parties, candidates, civic groups and others should analyze and then defend or seek to change certain provisions of legal frameworks for elections. It also notes why it is important to go beyond analysis and advocacy concerning legal frameworks and engage in monitoring implementation of the frameworks.

Section Two provides a systematic description of the underlying international human rights law principles for democratic elections and the normative process that is affecting state practice and citizen expectations in this area. Reviewing carefully the principles of inclusiveness, transparency and accountability as the sources for developing public confidence, the section provides the necessary grounding for analysis and advocacy concerning legal frameworks for democratic elections, as well as monitoring their implementation.

Section Three reviews basic issues in developing legal frameworks for democratic elections. It provides an overview and general guidance for law and regulation drafters and commenters on legal frameworks. This Section provides brief discussions of key points in addressing elements of the legal framework. Those analyzing or drafting legal frameworks should also review carefully the materials presented in Section Four of the Guide.

Section Four presents a checklist that addresses 16 common elements of legal frameworks for elections, goals that each element should accomplish in promoting democratic elections, a number of criteria to evaluate in analyzing whether the framework meets those goals and a number of questions to consider in determining whether the framework promotes democratic practices. It is a tool for understanding whether a legal framework provides a sound foundation for democratic elections and for identifying areas that should be improved.

The Guide also includes a list of places where NDI has provided commentaries on electoral laws and a list of places where parties and civil society organizations have developed such commentaries in part with NDI assistance. They appear as Appendices One and Two, respectively. They may help in identifying countries with similar traditions or framework issues for further inquiry by the reader.

Appendix Three sets out relevant provisions from international human rights instruments, which provide the underpinnings for legal frameworks for democratic elections. These provisions are important for developing national legislation, advocacy and judicial and regulatory deliberations.

Appendix Four presents relevant rulings by international human rights tribunals and other international bodies that decide actions brought to them concerning election related rights. The case citations are followed by brief annotations. This allows legal advocates to identify specific decisions and juridical trends that could have an impact on particular cases that they might lodge before domestic administrative and judicial forums and international tribunals.

In addition, the Guide includes a list of published resource materials that could be useful to those pursuing the promotion of legal frameworks for democratic elections, electoral integrity and democratic governance beyond elections. This list appears in Appendix Five of the Guide.